Supreme Court, U.S.
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No. 91-1266

In The

Supreme Court of the United States

October Term, 1991

ROBERT WILSON and NORMA WILSON; CLARENCE LUTTON and JUDITH LUTTON; and WLR CONSTRUCTION, INC.,

Petitioners,

vs.

KARR, TUTTLE, KOCH, CAMPBELL, MAWER, MORROW & SAX, P.S. and DEVITT D. BARNETT and JANE DOE BARNETT,

Respondents.

On Petition For Writ Of Certiorari To The Washington State Court Of Appeals, Division II

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

A Washington State Superior Court granted summary judgment in favor of defendants for two reasons: plaintiffs were unable to produce competent evidence that defendants breached any duty *and* plaintiffs were unable to produce competent evidence that defendants' actions caused plaintiffs' alleged damages. On appeal, the Washington State Court of Appeals addressed the causation issue only and held that plaintiffs did not produce evidence connecting the alleged breach with the alleged damages. This decision on causation was a ruling about evidence – not about different burdens or standards imposed in a legal malpractice case. Thus, the question for review is:

> Whether a state appellate court's determination that the plaintiffs failed to present any evidence of causation in a negligence action raises an important question of federal law.

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CASE OVERVIEW

Three people formed a small company to perform work at a King County, Washington landfill. They later incorporated that company with each owning one-third of the company. One of the three, Retherford, was later suspected of embezzling funds and on his own initiative decided to leave the corporation, both as a shareholder and as an employee. Under the shareholder agreement it was mandatory for him to sell his shares either to the corporation or to the two remaining shareholders.

The corporation immediately offered Retherford an amount that was greater than the value of his one-third share. Nonetheless, Retherford refused to accept this amount and instead demanded a far greater amount. The corporation bent over backwards to try to accommodate Retherford, but he was uncooperative and obstructed the negotiation process. The corporation finally settled its dispute with Retherford for a relatively large amount of money, despite the fact that it had treated him fairly throughout the entire process.

The corporation subsequently sued its attorney seeking to place the blame upon him for the settlement it ultimately reached with Retherford. The corporation never presented any evidence to the trial court that showed, with specificity, that the attorney breached the applicable standard of care or that the attorney's action caused any damage to the corporation. Because of this lack of evidence, the trial court granted summary judgment in favor of the defendants. The corporation subsequently asked for reconsideration and supplemented the

record with additional affidavits. Those affidavits, however, contained the same conclusory allegations as the previous affidavits that were submitted by the corporation. Accordingly, the trial court reaffirmed its ruling.

The corporation then appealed to the Washington State Court of Appeals. In a unanimous decision the court ruled that, upon the evidence presented to the trial court, the facts were undisputed that the attorney's actions did not *cause* any of the results that ultimately occurred. The court applied well-settled principles regarding causation and no new or novel issues were addressed. Instead, the court simply ruled that the record did not demonstrate that the necessary element of causation existed.[1] The court did not hold that legal malpractice cases are to be treated differently than any other type of negligence case, did not hold that a plaintiff in a legal malpractice case must meet a higher standard of proof, and did not hold that a judge in a legal malpractice case must decide issues that a jury in other negligence cases would decide. Instead, the court treated this case, upon review, as any other negligence case and held:

> The plaintiff in a legal malpractice action has the same obligation to demonstrate an issue of material fact as to causation as does the plaintiff in any other negligent action. The plaintiffs here failed to meet this obligation.

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[1] Because the court of appeals found that causation did not exist, it did not address the issue of whether the corporation could demonstrate that the attorney's conduct fell below the applicable standard of care.

There is no reason for the United States Supreme Court to review this decision.

THE PETITION FOR REVIEW SHOULD BE DENIED

The entire premise for petitioners' request is that they were treated differently than plaintiffs who bring other types of professional negligence or non-professional negligence claims. The record does not support this contention.

Petitioners contend that Washington State has a common law tradition of treating plaintiffs in legal malpractice cases differently than plaintiffs in other negligence cases. Petitioners cite no cases for such a novel proposition. Indeed, no such case exists. Just the opposite is true. Washington case law is firmly established that a plaintiff bringing a legal malpractice action is held to the same standards as those that bring non-legal malpractice negligence actions. *See, e.g., Stangland v. Brock,* 109 Wash. 2d 675, 679, 747 P.2d 464 (1987) (elements of legal malpractice actions are the same as those of an action for ordinary negligence); *Bowman v. Two,* 104 Wash. 2d 181, 185, 704 P.2d 140 (1985) (same). As in all negligence cases, the plaintiff must present some evidence of causation. Petitioners themselves cite the case of *Ward v. Arnold,* 52 Wash. 2d 581, 328 P.2d 164 (1958) which specifically held that the degree of proof of causation in a legal malpractice case is the same as in an ordinary negligence case. In any type of negligence case, the plaintiff must present some evidence of each element of negligence or judgment will summarily be entered against the plaintiff. *Young v.*

Key Pharmaceuticals, 112 Wash. 2d 216, 225, 770 P.2d 182 (1989); *Hartley v. State*, 103 Wash. 2d 768, 774-75, 698 P.2d 77 (1985). In addition, the mere fact that a party has affidavits from expert witnesses does not automatically preclude a court from granting summary judgment against that party. *See, e.g., Halvorsen v. Ferguson*, 46 Wash. App. 708, 735 P.2d 675 (1986), *rev. denied*, 108 Wash. 2d 1008 (1987); *Theonnes v. Hazen*, 37 Wash. App. 644, 649, 681 P.2d 1284 (1984); *Rorrer v. Cooke*, 313 N.C. 338, 329 S.E.2d 355 (1985).

In this particular case, plaintiffs were treated in the same manner as would any other plaintiff in a non-legal malpractice action.

Under Washington State Rule of Civil Procedure 56, in order for a plaintiff to survive a summary judgment motion he or she must present some evidence that could properly form the basis of a judgment in his favor. A plaintiff cannot rely upon the bare allegations contained in the complaint or upon conclusory affidavits, but instead must present specific facts that demonstrate a genuine issue of material fact. *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wash. 2d 1, 13, 721 P.2d 1 (1986). Unsupported conclusory statements are insufficient to prove the existence or non-existence of issues of fact. *Hash v. Children's Orthopedic Hospital*, 49 Wash. App. 130, 741 P.2d 584 (1987), *aff'd*, 110 Wash. 2d 912, 757 P.2d 507 (1988). These are the exact standards used by the Washington State Court of Appeals in its review of this case.

In reviewing the trial court's determination that petitioners did not come forward with any evidence showing

causation, the court of appeals applied Washington law that treats all plaintiffs in negligence actions equally:

> The plaintiff in a legal malpractice action has the same obligation to demonstrate an issue of material fact as to causation as does the plaintiff in any other negligent action. The plaintiffs have failed to meet this obligation.

(Petitioners' brief, App. 16-A.)

Petitioners spend most, if not all, of their brief discussing a so-called two step approach in determining whether there has been a breach of a duty in a legal malpractice action. While this may present interesting questions in a particular context, it is irrelevant here. No Washington court has adopted this novel theory and this theory was not used in this case. The court of appeals affirmed the trial court's decision based on lack of evidence showing causation. The court of appeals did not discuss the breach of duty element of the trial court's decision.

CONCLUSION

This case does not present an important question of federal law. In fact, it does not even involve any type of federal law issue, important or otherwise. This case only involves state law issues.

Petitioners cannot accept the fact that there was no evidence connecting the alleged damages with any of the respondents' actions. The petitioners have already had one full review of this case. There is no need for further review. Accordingly, respondents respectfully request

that the Court deny petitioners' request for a writ of certiorari.

DATED this 3 day of March, 1992.

Respectfully submitted,

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